Nos. 2969 and 2970

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Francisco & Portland Steamship Company (a corporation), owner of the American Steamship "Beaver", *Appellant*, vs. Leggett Steamship Company (a corporation), claimant of the Steam Schooner "Necanicum", her engines, boilers, boats, tackle, apparel and furniture, *Appellee*.	No. 2969
San Francisco & Portland Steamship Company (a corporation), *Appellant*, vs. Leggett Steamship Company (a corporation), *Appellee*.	No. 2970

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

This appeal is a trial de novo.

It is contended that this court should not give consideration to the questions raised by this appeal because of alleged findings by the lower court in the decree. This case, we submit, is not one for the application of such a drastic rule, for several reasons.

In the first place, the rule is not enforced in those cases where the trial court has not had the advantages of *seeing and hearing all of the witnesses.*

Hamburg-Amerikanische etc. v. Gye, 207 Fed. 247;

Lazarus v. Barber et al., 136 Fed. 534;

The Santa Rita, 176 Fed. 890;

1 C. J. 1351.

It enjoyed no such privilege in the present instance so far as the navigation of the "Necanicum" was concerned, for the most important witnesses—*in fact all of the "Necanicum's" officers, who controlled her navigation*—were not examined in open court, but on depositions. This included Captain Keegan, Mate Beckwith and Seamen Olsen and Gannan. *This condition of the record was not called to the court's attention by appellee in its effort to invoke the rule by which it hopes to shut out an inquiry into the "Necanicum's" navigation.* If such a rule should be applied to a case where all of the most material testimony of *one vessel* is taken on deposition, and not in open court, then it should be enforced when the same situation exists with respect to both vessels, and thus the right of review, in this court, of questions of fact in admiralty cases would be enforced. Yet it is settled law that a hearing on appeal in an admiralty cause is a trial *de novo.*

The Louisville, 154 U. S. 657; 14 S. Ct. 1190; 25 L. Ed. 771;

1 C. J. 1350.

Being a trial *de novo,* this court has repeatedly, and will, review a lower court's findings where material

evidence was given on depositions by witnesses not before the court. Had Captain Keegan's and Mate Beckwith's demeanor, while on examination, been under observation by the court, we would not have had the opinion rendered by the court below, which passed over in silence everything pertaining to the "Necanicum's" navigation.

In the second place, it is a rule of practice in admiralty causes that the written opinion of the lower court takes the place of findings ordinarily made in an action at law. So in this case, the only findings of fact which properly can be said to be those of the lower court are those embodied in its opinion. And this court will note that *not a word therein contained refers to the navigation of the "Necanicum."* Its silence upon the impossible theory of the "Beaver's" change of course, as detailed by Captain Keegan and Mate Beckwith, is ominous. The decree upon which appellee grounds its entire contention was not prepared by the lower court, but by proctors for appellee, and was presented to the court *ex parte,* without notice to appellant. As to whether the contents thereof, and the fact that they did not conform to the court's opinion, were called to the court's attention, appellant is unadvised, for it had no opportunity to be present. Certain it is, however, that the decree is not in conformity with or entered upon the findings set forth in the opinion. As most certainly there was not communication between the court and appellee's proctors as to the court's views regarding the merits of the case, save as such views were expressed in the opin-

ion, or in open court when proctors for both parties were present, it is manifest that when proctors for appellee prepared the decree entirely out of conformity to the opinion, it was not embodying therein any statement of fact as to the "Necanicum's" navigation of which it could have been advised that the court desired to make a finding. The viciousness of a practice which permitted the preparation and *ex parte* presentation to a trial court of decrees based upon opinions, without notice to the other side, and an opportunity to be heard, has been recognized by the District Court and this court, for in September, 1916, new rules effective November 1, 1916, were adopted which expressly require the serving of proposed decrees upon the opposing party. Why? Obviously, so that there can be no mistake about their conforming to the findings and conclusions of the court as set forth in its opinion.

It is clear that, notwithstanding the silence of the lower court's opinion upon the navigation of the "Necanicum", appellee was endeavoring to foreclose this court from considering the cause *de novo* on appeal, by invoking the rule now asserted. Yet, as we have pointed out, the effort was futile because the rule can have no application, under settled practice, to a case where all of the material testimony on which the findings are based was not taken in open court so that the trial court had an opportunity to observe the witnesses upon the stand. The findings as to which appellee claims an estoppel fall within this category, because they involve a consideration of the testimony

of Captain Keegan, Mate Beckwith and Seamen Olsen and Gannan, none of whom were produced in open court.

Furthermore, the facts as to the speed of the "Necanicum" are undisputed, so that the provisions of the decree in respect thereto, while designated "findings", are but conclusions of law, for the question was and is whether such speed was within the law.

We submit, therefore, that *the effort of appellee to induce this court not to examine into the navigation of the "Necanicum" should fail.* The very fact that it would like to have the court seal the book as to the testimony of her officers and crew bespeaks anything but a confidence in the lawfulness of the navigation of the "Necanicum." If there was no question as to her navigation, a trial *de novo* should have been welcomed, instead of an attempt made to invoke a rule which could have no application for reasons undisclosed by appellee to this court in asking for an enforcement of the rule.

The moderate speed rule requires a slackening under full speed. The "Necanicum" was in violation of the rule.

Appellee devoted a considerable portion of its brief to an argument that the cases cited by appellant laying down the rule that moderate speed as prescribed by the collision rules requires a reduction of speed under full speed are obsolete, and not good law. Yet, in connection therewith, two facts are worthy of note by this court, namely, that the decisions in those cases were principally rendered by the ablest and most experi-

enced American admiralty judge of recent times, District Judge Brown of the Southern District of New York, and that *not one decision in all of the American courts has been cited overruling them*, or even commenting adversely upon the rule therein enunciated. And in all of the cases of collision, which have arisen in the courts of (to the present time) the greatest martime nation, but *one* has been found which even reflects upon the rule. In this state of the record, we are confident that this court will stand by the decisions of the American tribunals, and will not erroneously follow an unsupported English case. If the rule is no longer binding, then surely some American decision would have been rendered discrediting it.

Nor do the reasons advanced by appellee show that the rule has become obsolete, for the differences between the statutory rule embodied in Rev. St. Sec. 4233 and Art. 13 of the Rules of 1885, and Art. 16 of the present rules, constitutes no reason for holding that the rule has become obsolete. By Art. 13, *every ship,* instead of *every steam vessel,* was required to go at a moderate speed, not only in *fog* as previously provided, but also in *mist* or *falling snow.* And by Art. 16, the conditions under which a vessel should proceed at moderate speed, were extended to include *heavy rainstorms.* But under all of the rules, the obligation of a steam vessel to proceed in a fog at moderate speed remained unaffected. This being true, the decisions which appellee would now, after all the years during which they have remained without adverse comment or overruling, have this court hold were obsolete, remain unquestioned authority.

That the rule has not become obsolete, but is operative today, finds definite recognition in the recent case of

The Robert M. Thompson, 244 Fed. 662,

wherein the Circuit Court of Appeals for the Second Circuit said:

> "The schooner is going as fast as it is possible for her to go. The International Rules of Navigation provide, article 16, as follows:
>
> 'Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at moderate speed, having careful regard for the existing circumstances and conditions.'
>
> It is, of course, difficult to define moderate speed in all circumstances but it is safe, we think, to define it as something less than top speed or full speed. *A vessel that is proceeding as fast as her machinery or her sails will carry her is not going at moderate speed.*" (Italics ours.)

The strenuousness of appellee's effort to have the rule repudiated by this court shows a consciousness that if it is to be enforced, the "Necanicum" must be held in fault, for there is no dispute about the fact, as shown by her log and the testimony of her officers, that she was proceeding at 8¼ knots, *her greatest speed* (see appellant's opening brief, pp. 5-15, for resumé of the evidence).

In fairness to the lower court, we may say that the "Necanicum's" violation of the rule in this regard was not called to the court's attention. As the fact of the "Necanicum's" speed was admitted, the question as to whether she was in violation of the collision rules is one purely of law. If the rule is enforced, the "Necanicum" must be held in fault.

We recognize, of course, that the rule, like all other rules, must be enforced with reason. As with other rules, extreme cases can be stated, as appellee has attempted to do, as though it proved that the rule had become obsolete. There can be no question but that the rule was laid down and enforced in the cases cited by appellant (brief pp. 15-21), but the reasons which appellee advances against the application of the rule at the present, would, if sound, have equally argued against it at the time Judge Brown rendered the decisions. The fact is that the grounds asserted for now denying the rule are without substance.

As we have said, the rule is to be applied with reason, and the statements of Judge Brown in the course of his opinions, in

The State of Alabama, 17 Fed. 847,

and

The Pennland, 23 Fed. 551,

would seem to be the proper criteria for the application of the rule. He said in the former:

> "Although the fog was not dense, it was nevertheless evidently such a fog as *materially to interfere with the timely observation of other vessels,* and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with Rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate *in the sense of Rule 21,* so long as she is going at her *ordinary full speed.*" (Italics ours.)

And in

The Pennland, he stated:

> "*Assuming that there was a sufficiently dense haze or fog,* as her witnesses assert, *to require the*

> *sounding of the fog whistle* at the time when the first whistle was given,—viz., the third blast before the collision,—*it was her duty to go at moderate speed* under Rule 21; that is, *reduced speed.*" (Italics ours.)

That is to say, *if the fog is such as to require the blowing of fog whistles, and as materially to interfere with the timely observation of other vessels, the rule is to be applied,* and will be violated if a vessel is going at her ordinary full speed. It is in this sense that the rule is to be enforced. And so applied, it is a rule as applicable today as when District Judge Brown enunciated it in his several cases cited. Nor, we submit, as thus applied in reason, is the rule essentially in conflict with the *one* English case upon which appellee relies in support of the theory of obsoleteness.

Applied to the "Necanicum", the rule absolutely condemns her, and the District Court would undoubtedly have so held had the rule been specifically called to its attention. The District Court found that a fog was prevailing, a condition evidenced by the fact that both vessels were blowing their fog whistles.

The Pennland, supra.

And it is apparent from the District Court's condemnation that it considered the fog to be of sufficient density to require a reduction in speed of the "Beaver." Mistake arose somewhere, evidently because the vessels did not have a clear vision of each other. In other words, the fog that prevailed and induced the masters of both vessels *to blow fog signals* was such, within the criterion of Judge Brown, *as materially to inter-*

fere with the timely observation of the other vessel, and to necessitate a reduction of speed within the rule in

The Pennland, supra.

One has but to read the statements of Captain Keegan and Mate Beckwith of the "insane" maneuvering attributed to the "Beaver" to become convinced, to be charitable, that the fog materially interfered with their timely observation of her. If not, then there would never have been the "mix up" in steering orders on the bridge of the "Necanicum" (appellant's brief, p. 29). It is a reasonable assumption that if Captain Keegan and Mate Beckwith ever saw so material, radical and insane a change of course as they claim for the "Beaver", and fog was not materially interfering with their observation, more timely danger signals would have been given and greater efforts to avoid the collision would have been made. The fact is that the circumstances establish a condition of fog such as to create a situation for the application of the moderate speed rule as interpreted and enforced by the courts in the cases cited by appellant. That rule was not complied with, but was violated by the "Necanicum" in running at full speed.

We respectfully submit that the "Necanicum" was in fault and that this court should so find. There is no sufficient reason to exempt her from the enforcement of the rule which applies alike to all vessels. It condemned the "Beaver" and unless special dispensation is to be meted out to the "Necanicum", it neces-

sitates her also being held in fault. And in reason so, because it follows that the large power which will drive a vessel like the "Beaver" through the water at high speed will also correspondingly check her quickly on reversing, whereas a lower power, like the "Necanicum's", will be as slow to stop her headway on reversing as it was to drive her at highest speed when under full headway. Running at full speed, the "Necanicum" had no reserve power to use in quickly stopping.

The Normandie, 43 Fed. 151, at 157.

If the fog was sufficiently dense to have necessitated the reduction of the "Beaver's" speed to place her in compliance with the rule, then, in justice there is no reason why the proceeding of the "Necanicum" at full speed should not condemn her.

The "Necanicum's" speed was excessive.

But even aside from the foregoing rule which should be enforced as against the "Necanicum", her speed was excessive even if adjudged by the rule which appellee would have the court apply, for the fact is that she was not brought to a standstill until before the impact. This is established by the uncontradicted testimony of the only independent witness called, that of Mr. Hewitt. It is true that he was a landsman, inexperienced at sea, but that fact should give greater weight to his testimony, for it is untarnished with the self-satisfied opinions of "sea lawyers" so commonly met with in collision cases. Appellee's personal attack upon Mr. Hewitt proves nothing more than a realiza-

tion by appellee that if credence is given to Mr. Hewitt's statements of what he saw, the condemnation of the "Necanicum" must follow as certain as the sun rises on the morrow, for it would have been a physical impossibility for collision to have occurred without the "Necanicum's" having maintained substantial headway up to the moment of impact. *No witness testified that,* if the vessels were in the relative positions that Mr. Hewitt saw them to be, *the collision could have occurred without the "Necanicum's" maintaining her headway to the impact,* although appellee utilized the services of the experts who evolved the "impaling theory."

Were Mr. Hewitt not a lawyer of standing and credence at the bar of Portland, that fact could easily have been established by the eminent Portland counsel who cross-examined him, but no, the court is asked to dismiss his testimony as unworthy of belief, because four lawyers, whom appellee consulted, did not enjoy a personal acquaintance with Mr. Hewitt. That could be said of most any lawyer in these days of intensified business in the large cities. But it proves nothing as to Mr. Hewitt. And so the fact stands substantially unchallenged that the steamers approached as he says. If so, then not only did the "Necanicum" maintain her headway until the collision, but the "Beaver" could never have cut the course that the "Necanicum's" witnesses attributed to her.

Appellee comments upon the fact that other disinterested witnesses than Mr. Hewitt were not called. Why should they? Mr. Hewitt's statements are not

contradicted by any other independent witness. And if, as we have said, credence was not to be given his statement, that fact could have been readily proved by the Portland counsel in the case. On the contrary, however, the straightforward and unaffected way in which he detailed his observations substantiated their truth.

The court will note with pertinent interest that *not a case is cited by appellee holding that a vessel going at a speed of 8 knots in a fog is not excessive, whatever the density of the fog,* although vessels have been condemned, time after time, for proceeding at a lesser speed (appellant's brief, pp. 22-28).

We respectfully submit that if this court holds, as it must if it does not reverse the lower court, that the "Beaver" should be condemned for proceeding in a fog at a rate under its normal full speed, but that the "Necanicum" should be excused notwithstanding that she was going at a full speed of 8¼ knots in the same fog, it will render a decision that will be without precedent in all the American admiralty courts.

The alleged course of the "Beaver".

The drawing which "proctor," *not by a witness,* has drawn to "demonstrate" how the collision occurred *illustrates the absurdity of the course which the officers of the "Necanicum" would have the court believe the "Beaver" steered.*

Can this court imagine anything more insane than to think that the "Beaver", laden with passengers and proceeding at a speed of 14 knots, on a straight, clear